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In the

Supreme Court of the United States

October Term, 1975

No. A-267

JAMES L. ALLEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals has not yet been officially reported and is printed in the Appendix hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on September 2, 1975. (Appendix A) The jurisdiction of this Court is invoked under 28 USC Sec 1254(1).

An Order Extending Time to File Petition for Writ of Certiorari, signed by Mr. Justice Stewart and dated September 26, 1975, extended the time to file this petition to and including November 1, 1975 (Appendix B-Order and letter forwarding same).

QUESTIONS PRESENTED

1. Whether the trial court's denial of petitioner's Motion to Suppress certain evidence effectively deprived petitioner of his rights under the Fourth, Fifth, and the Sixth Amendments to the United States Constitution.

2. Whether the United States District Court denied petitioner his inalienable right to a fair trial when it denied his Motion for Continuance after an affirmative showing that his most knowledgeable attorney had suffered a severe illness and at the time of the trial was in the process of recuperation.

3. Whether the trial court committed reversible error when it denied to this petitioner the referral report of Internal Revenue Service Agent Tracy and the Criminal Reference Report of Special Agent Pope pursuant to 18 USC Section 3500 for use in cross-examination of those witnesses.

4. Whether the Trial Court committed reversible error when it admitted into evidence, and sent into the deliberation room, Government's Exhibit 31 and other charts and summaries prepared by the Government.

5. Whether the Trial Court committed reversible error when it allowed into evidence hearsay testimony of Internal Revenue Service with regard to the accounts receivable leads submitted by this petitioner.

6. Whether the Trial Court committed reversible error when it did not dismiss the indictment or in the alternative strike the testimony of Special Agent Pope when it was disclosed that his testimony had been selectively not recorded along with the testimony of other witnesses before the same Grand Jury.

7. Whether it comports with established procedure, and whether petitioner was denied a fair trial, when one Government witness, testifying as an expert witness, was permitted to challenge the credibility of another Government witness, testifying favorably for the petitioner, in the presence of the jury.

8. Whether this petitioner was denied his Constitutional right to a fair trial and to the effective assistance of counsel when his defense counsel interposed no defense despite considerable documentary evidence and oral testimony being available. All of which was submitted to the United States Court of Appeals in the form of documents and sworn affidavits and which the Sixth Circuit Court of Appeals refused to consider.

9. Whether petitioner was denied the effective assistance of counsel guaranteed by the United States Constitution by the

intimidatory and coercive acts of the Internal Revenue Service, which had an active interest in the case; particularly when such acts were directed against defense counsel during the very course of the trial.

10. Whether petitioner's conduct during all pre-indictment phases of the investigation preclude any charge of "Wilfully and Knowingly" committing any criminal offense.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated."

Fifth Amendment:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . . "

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense."

18 U.S.C. Sec. 3500:

DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

(e) The term "statement", as used in subsections BO, (c) and (d) of this section in relation to any witness called by the United States, means -

(1) a written statement made by said witness and signed or otherwise adopted or approved by him.

* * *

26 U.S. C. Sec. 7201

ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7206 - FRAUD AND FALSE STATEMENTS.

Any person who -

(1) Declaration Under Penalties or Perjury.- Wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT

Petitioner was charged with three (3) counts of attempting to evade and defeat federal income taxes in violation of 26 USC Sec. 7201 by indictment filed January 10, 1973 in the District Court for the northern District of Ohio. On September 10, 1973 and evenditiary hearing was held

on petitioner's motion to suppress evidence, obtained in the course of the Internal Revenue Service investigation. On September 13 the Honorable Leroy J. Contie denied above mentioned motion. On **February** 5, 1974 a motion for continuance of trial was filed on behalf of the petitioner and overruled on February 8, 1974 by Honorable Leroy J. Contie.

Trial commenced on February 25, 1974 and concluded March 14, 1974. Prior to trial proceedings Count I of the indictment was dismissed by the District Court upon motion of the United States Attorney.

Government rested its case on March 14, 1974. No defense was offered and a verdict of guilty was returned by the jury on both counts of the indictment.

On April 5, 1974 a motion for new trial was filed on behalf of the petitioner and subsequently denied by the Honorable Leroy J. Contie on April 19, 1974.

On May 22, 1974 petitioner was sentenced by the Honorable Leroy Contie to wit:
COUNT TWO: Sentenced to six (6) months confinement, four and one-half years probation and a fine in the amount of $2,500.00.
COUNT THREE: Sentenced to six (6) months confinement, four and one-half years probation and a fine in the amount of $2,500.00.
Confinement and probation to run concurrent with Count 2, fines to be paid separately.

WHEREUPON petitioner filed his timely Notice of Appeal and was continued upon per-

sonal recognizance bail in the amount of $1,000.00.

Upon his appeal to the Court of Appeals for the Sixth District his conviction was affirmed. Motion for Stay of Mandate and continued bail was granted.

The theory of prosecution upon which petitioner stands convicted was the "net worth" method of proving a criminal under statement on his 1967 and 1968 federal tax return.

Petitioner's conviction was largely based on the uncorroborated, extra judicial alleged statements of said petitioner to Agent James Tracy (who has a pronounced hearing problem, wears two hearing aids (TR 104, 114), and documents (and information flowing from them) received from petitioner by Special Agent Pope. The very nature of the agent's behavior and manner as laid out in Internal Revenue Manual 4231, Audit Division - Audit Technique Handbook, for Internal Revenue Agent Sec. 920, Approach, (Appendix C) (The mere reading of this section by anyone concerned with the preservation of the Bill of Rights, particularly the Fourth and Fifth Amendments, will fill him with revulsion and indignation as to how far this administrative agency has strayed from the mandates of the Constitution and makes it clear that a taxpayer places himself in jeopardy by responding to the most innocuous question put to him by any agent of the Internal Revenue Service), is one that fails to

give the taxpayer any notice of the importance of his questions and to give due consideration to his answers rather than treat them as casual conversation. This material was only recently made available outside the Internal Revenue Service under the mandate of the Freedom of Information Act (5 U.S.C. Sec. 552).

ARGUMENT

Under the Constitution of the United States of America, no person shall be deprived of his freedom or property without "due process of law" and without the "equal protection of the law". Due process of law, of course, pre-supposes that defendants in criminal cases shall have vigorous and effective assistance of counsel, with every defense and favorable evidence presented in his behalf. This principle comes to American Law as a result of having been deeply imbedded in the minds of free men and constitutes the very foundation of Constitutional law under which Americans live. Students of law as well as the layman frown sharply upon a person being convicted of a serious crime without due process of law and the equal protection of the law. Each of the ten issues presented herein were submitted before the United States Court of Appeals for the Sixth Circuit, and each

issue presented screams loudly of a denial of due process and equal protection of the law.

QUESTION I

After an evidentiary hearing the petitioner's motion for suppression of evidence was denied. The court of Appeals upheld the District Court, quoting United States v. Marra, 481 F2d 1196, 1203 (6th Cir. 1973), cert. denied 414 U.S. 1004, in the absence of a clear showing that the taxpayer has been tricked or deceived by the documents and statements obtained by the Internal Revenue agents are admissible.

Since the evidentiary hearing and filing to the Court of Appeals the petitioner has come into possession of material which can be considered as new evidence. Under the Freedom of Information Act 5 USC Sec. 552, petitioner sought and eventually received copies of the Audit Technique Handbook for Internal Revenue Agents (App. C) and the Handbook for Special Agents, Intelligence Division.

There can be no question after reading selected sections of these official handbooks that the agents did misrepresent and deceive and that this behavior is authorized and routine policy for agents of the Internal Revenue Service.

Appendixes C and D will clearly show that the original agent was not doing a routine audit but a net worth audit and

was to secure information that "might become unavailable later". Most significant is the absence of any mention by the agent in his memorandum of December 11, 1969 (the initial meeting) of any examining of the petitioner's books and records to determine they were inadequate.(App.D)

Moving on to the Special Agents Handbook we find under the title of Tax Cases (Evidence and Procedure) Sec. 335 "All initial assignments have as their objective the development of a potential criminal case". Sec. 336.1 9(c) Detrimental effects to be avoided are: 4. Premature disclosure of the course of investigative action to the principals and others. (6) The question of when the special agent should initially meet the principal should be decided after considering the advantages of both early and delayed interviews. (7) There should be no affirmative misrepresentation or concealment. The special agent will advise the subject of his constitutional rights as required by Internal Revenue Manual 9384.

Sec. 336.1 9(a) The special agent should be sufficiently familiar with the audit or collection features of the case and the cooperating officer sufficiently familiar with its criminal features to corroborate or complement each other's testimony if necessary.

Internal Revenue Service Agent Tracy and Special Agent Pope did not claim to have given petitioner the Miranda warning before he turned over to them the

records, files and documents pertaining to his earnings for the years 1966, 1967 and 1968. In fact, both Agent Tracy and Special Agent Pope testified under oath that they did not recite the Miranda warning to petitioner. Rather, they attempted to evade the omission with the claim that none of the materials received from petitioner were used in the prosecution. Testimony at the trial proved that the special agent did request and receive from the petitioner (through Mr. Howes thus avoiding a face to face confrontation) documents that were used to build the case against him.

In BECKWITH v. UNITED STATES, ____ U.S., ___, ___ S.Ct.___, (U.S. Supreme Court #74-1243) Certiorari Granted 6-16-75, it was not denied that the defendant in that case was given a portion of the Miranda warning in spite of the fact that he was not in custody. No doubt, the special agent involved in BECKWITH was following the mandates of HANDBOOK FOR SPECIAL AGENTS, Intelligence Division, Internal Revenue Manual Chapter 9900, which ordered that special agents advise "the subject of the investigation substantially as follows:

"In connection with my investigation of your tax liability (or other matters) I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers

or information which you submit may be used against you in any criminal proceeding which may be undertaken.

I advise you further that you may, if you wish, seek the assistance of an attorney before responding."

It was admitted by Special Agent Pope at the trial in the instant case that even that minimal warning was not given this petitioner. The same sworn admission was made by Agent Tracy who referred the case to Special Agent Pope.

It cannot be disputed that at the time the case was referred by Agent Tracy to the Intelligence Division, this petitioner became a virtual or putative defendant requiring the recitation of the minimum requirements of MIRANDA v. ARIZONA, 384 U.S. 436, upon first contact by any agent. (See Boyd v. United States 116 U.S. 616, 6 S.Ct. 5/24/1886). It is also clear that the mere fact that the first contact took place by phone to petitioner's home does not relieve the Government from the minimum requirements of MIRANDA.

Petitioner contends he became a virtual or putative defendant, a target for the application of the criminal tax laws by special agents of the Intelligence Division who were set upon conviction. This Court explained what it meant by "custodial circumstances" in MIRANDA when in Footnote 4, it described them as an "investigation which had focused on an accused". (384 U.S. 436, 444.)

The BECKWITH Petition for Certiorari states:

"Heretofore, courts have not exclusively looked to prison walls, handcuffs, or back room police station physical restraint as the touchstone of MIRANDA. They have also taken note of the focus of the investigation upon the accused and the "target" of Government investigators. OROZCO v. TEXAS, 394 U.S. 324. United States v. Robinson, 142 U.S. App. D.C. 43, 439 F.2d 553."

In BECKWITH, the defendant was given some semblance of the MIRANDA warning. In the instant case, this petitioner was given NO warning or advice as to his rights. The courts implementing MIRANDA have jealously guarded the exact substance of this right. UNITED STATES v. MULLINGS, 364 F 2d 173, 175 (2nd Cir.); United States v. Fox, 403 F 2d 97, 100 (2nd Cir.)

Absolutely no mention was made to this petitioner that he had a right to an appointed attorney. Since the date of the MIRANDA decision, courts have suppressed statements which did not include this portion of the required warning. GREEN v. UNITED STATES, 411 F.2d 588 (10th Cir); UNITED STATES v. MILLER, 261 F. Supp 442 (D.Del.)

Dispositive of this issue is MATHIS v. UNITED STATES, 391 US 1, 20 L Ed 2d 381, 88 S.Ct. wherein Mr. Justice Black speaking for the Court said:

"Before eliciting this information, the Government agent did not warn petitioner that any evidence he gave the Government could be used against him, and that he had the right to be silent if he desired as well as the right to the presence of counsel and that if he was unable to afford counsel, one would be appointed for him. At the time of the trial petitioner sought several times without success to have the judge hold hearings out of the presence of the jury to prove that his statements to the revenue agent were given without these warnings and should therefore not be used as evidence against him. For this contention he relied exclusively on our case of Miranda v. Arizona, 384 US 436, 16 L Ed 2d 694, 712, 86 S.Ct. 1602, 10 ALR 3d 974 (1966). The District Court rejected this contention as did the Court of Appeals in affirming. 376 F.2d 595. We granted certiorari to decide whether the Miranda calls for reversal. We hold that it does."

The law in the Seventh Circuit is that, whenever a case has shifted to the Intelligence Division of the Internal Revenue Service, the involved taxpayer must be accorded the benefit of full MIRANDA warnings. UNITED STATES v. DICKERSON, 413 F. 2d 1111 (7th Cir.). In reaching its decision on this issue, the Seventh Circuit Court of Appeals relied heavily upon the District Judge in UNITED STATES v. TURZYANSKI, 268 F.Supp. 847 (N.D.Ill.),

who ruled as follows:

> (O)nce a taxpayer becomes the subject of a criminal tax investigation, as evidence by the referral of the investigation to the Intelligence Division or otherwise, our adversary process of criminal justice has become directed against him as a potential defendant. Any evidence obtained from him is admissible (sic) only if the taxpayer furnished it after knowingly and voluntarily waiving his Constitutional rights and privileges. (Citations omitted)
>
> To hold otherwise would lead to the anomalous conclusion that a person suspected of bank robbery, sale of narcotics, murder, rape or other serious crime is entitled to greater Constitutional rights than a person suspected of violating the Internal Revenue laws. For when the silent transition from civil to criminal investigation takes place in a tax case, the taxpayer being interrogated and asked to furnish books and records is just as surely a prime suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes. (Id. at 850-851.)

In attempting to reconcile the opinions issuing from the Seventh Circuit Court of Appeals with the opinion of the Sixth Circuit Court of Appeals in this instant case (App. A), it can only be determined that not only are bank

robbers, narcotics sellers, murderers and rapists afforded a greater protection of their Constitutional rights, likewise are the residents of the Seventh Circuit afforded a greater protection of their Constitutional rights as are the residents of the Sixth Circuit, in direct violation of the Fourteenth Amendment to the Constitution of the United States.

The Solicitor General for the United States, in his Memorandum opposing the granting of certiorari, in BECKWITH v. UNITED STATES relied upon the fact that this court has denied certiorari for the reason that ". . . the Internal Revenue Service adopted in 1967 a "modified MIRANDA warning" to be used in such cases. The Solicitor General states:

> "Since the time of the DICKERSON decision, there have been a number of certiorari petitions filed by defendants in tax prosecutions seeking review, as does petitioner here on the ground of the conflict created by DICERKSON. However, because the agent in DICKERSON gave the taxpayer no warning and the Internal Revenue Service adopted in 1967 a "modified MIRANDA warning" to be used in such cases, we have consistantly opposed certiorari in such cases. (Citations omitted) (Emphasis supplied)

The emphasis supplied above is used to direct this Honorable Court's attention to the fact that at no time was this petitioner given the benefit of even the "modified MIRANDA warning".

As stated in BECKWITH, supra:

THE IMPORTANCE OF THIS CASE

> In the light of this nation's recent experience with an Administration's compiling "enemies lists" and utilizing the Internal Revenue Service to "harass" citizens because of their unpopular political views or for other non-tax-related reasons, this case clearly involves a question of exceptional importance meriting consideration by this Court. Because this country utilizes a system of self-taxation and because our tax laws are so technical and complex, there exists, on the part of those who administer those tax laws, a great potential to abuse the Fifth Amendment's privilege against self-incrimination. The legality of the Government's labeling a citizen a target defendant for a non-tax-related reason and then proceeding to harass him and to convict him out of his own mouth without extending him the full panoply of Fifth Amendment rights is a question of far-reaching significance. E.G., this case presents an excellent opportunity for judicial consideration of the propriety of the anumalous situation existing with respect to special agents of the Intelligence Division of the Internal Revenue Service. It is counsel for petitioner's understanding that the involved Intelligence Division of the Internal Revenue Service is this country's only criminal law enforcement

> agency that has, as a matter of routine, substituted its own limited advice of rights for those set out by this Court in Miranda v. Arizona.

QUESTION II

It is axiomatic that effective counsel is counsel who is prepared to proceed to trial thoroughly conversant with all the elements of the cause, and most particularly with the exculpatory evidence which could be presented in his client's behalf which would ensure a "not guilty" verdict. The denial of a continuance on February 8, 1974 in effect denied this right to the petitioner.

Prior to trial call Mr. Lebit (engaged in January 1971), the most knowledgable attorney was hospitalized and recuperating. Other defense counsel petitioned the court for a continuance for the reason that he was not familiar with every aspect of the case, which was an exceedingly involved one. (In his Memorandum in Support of Motion for New Trial, trial counsel, Robert J. Rotatori, himself raised the issue of ineffective counsel for the reason that his Motion for Continuance

was denied.

A research of decisional law reflects that courts of review consider each allegation of prejudice resulting from denial of continuance on an ad hoc basis. However, such research further reflects that reviewing courts are not loathe to reverse convictions when actual prejudice can be shown in the denial of a continuance. See: 112 ALR 608.

Further, the granting of the motion for continuance would have created no problems to the case of the Government for the reason that the entire case was not based upon the memories of the Government witnesses, rather it was based upon records which would not have deteriorated in a matter of days, weeks or months.

It is this petitioner's respectful position before this Honorable Court that the prejudice suffered by him with the denial of a continuance resulted directly in his conviction after trial counsel, having no knowledge of the evidence available to him, rested his case without the presentation of a single witness in petitioner's behalf.

QUESTION III

During trial of this cause counsel moved for certain reports to be made available to him under 18 U.S.C. Sec. 3500 (Jencks Act). The Trial Court held that the reports of the agent were not Section 3500 material. The Sixth Circuit Court of Appeals rejected the findings of the trial court, held that the reports were, indeed, Jencks Act material but the error in the trial court holding was "harmless error", relying upon their own decision in UNITED STATES v. BALL, 428 F. 2d 26 (6th Cir. 1970).

"It is our opinion that even though the entire reports could have been considered producible under the Jencks Act, the failure to order production was harmless error."

The Government in its reply brief to the Court of Appeals that the defense had not asked for the special agent's report and was therefore "not entitled to it". Trial counsel in his memorandum in support of a new trial states:

> "V. The court erred in denying to the defendant the referral report of Agent Tracy and the Criminal Reference Report of Special Agent Pope pursuant to Title 18 U.S.C. Sec. 3500 for use in cross examination of those witnesses."

Subsequent to the testimony of both Agent Tracy and Special Agent Pope the defense requested production of their reports which both witnesses stated

contained information relative to their direct examination. In net worth tax prosecutions where the Government builds its case mainly on the testimony of agents and their computations, a very broad range of statements within testifying agents' reports are producible. United States v. Burke, 279 F. 2d 1082 (7th Cir. 1971). The necessity to the conduct of the defense of producing agent's reports relating to assets, income and expenditures during the entire tax period in question, whether prepared for criminal or civil tax purposes to determine whether any statements of fact therein were inconsistent with or contradictory to the testimony in preparation of the charts and computations used by them is recognized in United States v. O'Connor, 273 F. 2d 358 (2d Cir. 1959), wherein the Court said:

> "If the Government chooses to depend on the expertise of a witness for proof of the essentials of a criminal charge, it cannot insulate him from a thorough cross-examination by any claim of a sovereign right to secrecy of reports or methods of computation."

Even where the trial judge thinks that the result of the trial could not conceivably have been altered by the failure of producing reports wo which the defense was entitled, such omission is a substantial error under the mandate of the Jencks Act. United States v. Prince, 264 F. 2d 850 (3rd Cir. 1959). "It is not the function of the District Court or ourselves to determine whether the appellant was prej-

udiced by failure to make available the relevant portions of the prior report of the witness." Id, at 852.

The United States Supreme Court expressed the same view in United States v. Clancy, 365 U.S. 312, 316 (1960 wherein Mr. Justice Douglas states:

> "Since the production of....statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively."

Apparently, the Sixth Circuit Court of Appeals does not concur with the holding of this Honorable Court in Clancy, supra.

In DENNIS v. UNITED STATES, 384 US 855 (1966), this Honorable Court HELD:

> "(It is not) realistic to assume that the trial court's judgment as to the utility of the material for impeachment or other legitimate purposes, however conscientiously made would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate".

However, in the instant case, petitioner's advocate was stopped before he could start by the trial court's ruling that the reports of the revenue agent were not Jencks Act material. Petitioner was given

no opportunity by the Sixth Circuit Court of Appeals to show that the error was not "harmless error" when he was not permitted to view the reports of the revenue agent.

> "These same considerations require that the petitioner have the opportunity to examine the agent's report and to attempt to demonstrate to the court that the error was not harmless. Affording the petitioner such an opportunity will minimize to the extent possible the dangers of permitting judicial speculation as to the utility of a statement to the defense." Adversary proceedings will not magically eliminate all error, but they will substantially reduce its indicence by guarding against the possibility that the... judge, through lack of time or unfamiliarty with the information contained in and suggested by the materials, will be unable to provide the scrutiny. . . demand(ed)." Alderman v. United States.

394 US 165 cited in ERCKMAN v. UNITED STATES, 40 L. Ed 2d 115, 117.

Petitioner respectfully contends that dispositive of this issue is the language of the dissenting Opinion in ERCKMAN wherein it was said:

> "Our judicial system is designed to function in the context of adversary proceedings. We are therefore reluctant to authorize ex parte, in camera

> determinations unless they are truly necessary to protect important governmental interests. Indeed, in Dennis and Alderman the Court, in order to avoid in camera determinations akin to those approved by the Court of Appeals here, ordered disclosure of the testimony and conversations involved despite substantial countervailing interests in Dennis, the interest in Grand Jury secrecy, and in Alderman the interest in national security. In sharp contrast, there is no justification here for not disclosing the agent's statement to the defense, and thus no necessity for the in camera determination engaged in by the Court of Appeals. The court has already determined that the Jencks Act gave petitioner the right to examine the agent's report in the first place; at that point, no substantial governmental interest in refusing disclosure of the report remained. Yet disclosure of the report is essential to permit the defense to make an informed presentation of the uses to which he might have put the report. And without consideration of such a presentation by counsel, the Court of Appeals could not make a truly informed decision on the harmless error question."

QUESTION IV

The District Court allowed into evidence Government's Exhibit 31 which was the net worth analysis in document form with supporting schedules which were explained by the Government's expert accountant, and illustrated on a series of four by eight foot blackboards before the jury. (However, see challenging documentary evidence submitted herewith, refused effect by the Sixth Circuit and never even considered by defense counsel who didn't realize such evidence was available to him.) When the jury retired for its deliberations, Government's Exhibit 31 and its supporting schedules accompanied the jury. "Charts, summaries and schedules must fairly present and summarize the entire evidence on which they are based." United States v. O'Connor, 237 F.2d (2d Cir. 1955).

"Conclusions by the Government in net worth summaries which purport to be based on all the evidence must reflect testimony at trial which are favorable to the defendant." Flemister v. United States, 260 F. 2d 513 (5th Cir. 1958). Where conclusions of the Internal Revenue expert are based upon assumptions contested at trial or testimony subject to impeachment the inclusion of those items in a net worth summary has been held to be error. Baines v. United States, 426 F. 2d 833 (5th Cir. 1970). Likewise computations in a net worth summary exhibit which goes beyond the summarization of evidence and includes within it an evaluation of the credibility, reliability and weight of certain of the testimony renders such exhibits inadmissible. Steele v. United States, 222 F. 2d 628 (5th Cir. 1955). In this case the net worth exhibit submitted to the jury included opening and ending figures of accounts receivable of the defendant. The Government's expert witness admitted that some of the accounts which made up the account receivable in the exhibit were based upon extra-judicial statements of the witnesses and not upon their testimony in trial because the expert did not believe the in-court testimony of the witnesses. The court allowed the prior statements of the Government witness to be used by the Government over the objection of the defendant for impeachment purposes. The expert used the reference to the statements for substantive purposes in the net worth analysis. In addition, the weighing and evaluating of the witnesses' testimony by the expert in arriving at a conclusion to be placed in the net worth summary also rendered the summary inadmissible.

In HOLLAND v. UNITED STATES, 348 U.S. 121, this Honorable Court announced a basic guideline for prosecutions of income tax evasion cases utilizing the increase in net worth method of proof to consist of:

> "...the establishment with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the

result depends entirely upon the inclusion in this sum of all assets on hand at the outset."

This guidelinewas not adhered to in the instant case in undertaking to establish a net worth for petitioner on December 31, 1966.

Previous to the trial the Government subpoenaed certain reels of microfilm covering specific dates, from the Harter Bank. These microfilms were not introduced into evidence but the Government requested they be maintained at the Court House during the course of the trial.

Special Agent Pope then testified to items in the net worth schedule using the above-mentioned microfilm as the basis for his figures. These figures were in turn used by the Government expert in her net worth analysis.

Special Agent Pope omitted from his testimony seventy-four (74) uncashed checks on hand as of December 31, 1966 all of which were reflected in the subpoenaed microfilm.

The petitioner had copies of the Harter Bank microfilm in the court room at the time Agent Pope was testifying. Photocopies of these seventy-four checks were handed to defense counsel who was totally unaware of these checks and the value of them for impeachment purposes along with their effect on the expert witness' summary.

It is to be remembered with the greatest of emphasis the fact that the Summary Schedule 31, submitted to the jury during their deliberations was compiled from the Special Agent Pope's testimony.

Although the microfilm was not offered into evidence by the Government, and the Schedule 31 compiled from the testimony of Special Agent Pope from the microfilm was offered and accepted into evidence, they are all a part of the court records contrary to the findings of the Sixth Circuit.

Further, petitioner is constrained to ask if the microfilm was not offered into evidence by the Government ONLY because the 74 check deficiency would be noted by the jury?

During the trial, petitioner was in physical control of photocopies made from the microfilm which would have shown without any question the selectivity of Special Agent Pope's testimony relating to the microfilm. Further, he was in physical control of a plethora of documentary evidence proving beyond a doubt the additional 31 errors appearing in the Schedule 31. However, Mr. Allen found it impossible to direct his counsel's attention to the massive amount of errors in said Schedule 31.

QUESTION V

Over the strenuous objection of defense counsel, the trial court permitted testimony of several agents to the effect that they had contacted the accounts receivable

leads submitted to them by this petitioner and that they were not able to verify the amounts. Petitioner objects to this testimony on the basis that it was hearsay and denied the defendant his right to the confrontation of witnesses and the right of cross-examination. In Olender v. United States, 210 F. 2d 795 (9th Cir. 1954) a conviction was reversed due to the admission of hearsay evidence. An Internal Revenue agent testified that he spoke to persons and that his determination was that certain withdrawals were not gifts to the taxpayer. The appellate court held that this testimony was inadmissible hearsay and reversed the conviction. The testimony in Olender, supra, is not far removed from the agents' testimony in the instant case.

In California v. Green, 399 U.S. 149 (1970) it was held:

> "The admission of the testimony of the agents also worked a denial of the right of confrontation. A defendant has the inalienable right to cross-examine witnesses where it is necessary to provide the trier of fact with a satisfactory basis for evaluating the truth of the testimony.
> SEE ALSO: Dutton V. Evans, 400 U.S. 74 (1970)

QUESTION VI

The indictment in this case was returned on January 10, 1973. On January 15, 1973 the District Court established,

as a matter of rule, the necessity of recording all Grand Jury testimony. For months prior to the effective date of the rule, the Department of Justice was aware of Crim. Rule 3 C of the U. S. District Court, Northern District of Ohio.

Following the direct examination of Pope, the special agent in the instant case, defense counsel moved for the production of his testimony before the Grand Jury pursuant to Title 18, Section 3500. Government counsel then disclosed to the court, at the bench, that a transcript of the agent's testimony before the Grand Jury did not exist! His testimony was not recorded as was that of all other witnesses before the Grand Jury. The failure to keep a record of the Grand Jury testimony in regard to Agent Pope therefore necessitated a departure from Supreme Court Decisions establishing a defendant's right to examine Grand Jury minutes and to use such minutes for impeachment purposes. See, e.g. Dennis v. United States, 384 U.S. 855 (1965).

The selective recording of witnesses' Grand Jury testimony in this case, and particularly the non-recording of Special Agent Pope's testimony served to deprive this petitioner of the use of that testimony for purposes of cross-examination.

It is this petitioner's firm position that the United States Attorney, rather than placing reliance on the fact that the indictment was returned on January 10, 1973, and the Court Rule requiring the recording of all testimony was not effective

until January 15, 1973, should, in the interest of justice, explain to this Honorable Court the reason for the selective non-recording of the special agent's testimony before the Grand Jury.

> "The interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done." Jencks v. United States, 353 US 567, 77 S Ct. 1007.

QUESTION VII

At trial transcript page 1105, Adele Kihlken was called to testify as an expert witness for the Government. Ms. Kihlken was permitted to remain in the court room throughout the trial.

Government witness Pagnotta testified favorably for the petitioner's cause. Expert witness Kihlken was permitted to challenge the credibility of Government witness Pagnotta. While being asked by defense counsel if she had taken into consideration the testimony of witness Pagnotta in her figures she was testifying to, Ms. Kihlken responded:

> "Mr. Pagnotta identified purported payments. The payments are not in evidence. And Mr. Pagnotta's testimony somewhat lacked credibility."

(At this point, the trial judge advised the expert witness that the "purported payments" were indeed in evidence being

Defense E hibits B through L, a total of eleven (11) photocopies of money orders sent to petitioner by witness Pagnotta.)

The Sixth Circuit could find no error for the reason that the challenge to witness Pagnotta's credibility by Government witness Kihlken occurred while under cross-examination by defense counsel. No where in said trial transcript is it to be found that defense counsel invited the challenge to witness Pagnotta's credibility from witness Kihlken.

QUESTION VIII

> "Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations, and defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner. U.S.C. Amend. 6". Beasley v. United States, 491 F. 2d 687 (1974)
> (Emphasis added)

In this case, defense counsel never looked at any record or document in this petitioner's possession nor did defense counsel ever contact a defense witness from a list provided months earlier from which could have and would have formed the basis of affirmative defense. It is unquestionable that defense counsel was

relying heavily on his Motion for Continuance being granted, and when it was denied he was totally unprepared for trial.

This petitioner was advised by Attorney Lebit (incapacitated during trial) that there would be meetings prior to trial to discuss the defense and during the trial at lunch and after adjournment for the day. (Letters and telephone transcripts support this contention). None of these meetings ever took place, although the trial lasted from February 25, 1974 to March 14, 1974.

However, this petitioner asserts, even during the trial he tried to apprise counsel of the fact that petitioner was in possession of records and documents which would dispute allegations projected by the United S ates Attorney.

It should also be noted he did not consult with the possible defense witnesses who accompanied petitioner to the Court House to testify in his behalf. He had no knowledge as to what any of the witnesses would have testified.

Further, the Government subpoenaed four witnesses who were accounts receivables prior to 1967. Two of the witnesses were called and testified in a fashion favorable to this petitioner. Whereupon the Government decided not to call the other two. Counsel made no effort to consult with these witnesses who did not testify to determine whether their testimony would also be favorable.

The only inference to be drawn from the abandonment of the witnesses by the Government is that the testimony of said witnesses would have also been favorable to this petitioner. These same witnesses were among those who were to be called for the defense to testify as to petitioner's accounts receivable prior to 1967. Contradicting the testimony of both the revenue agent and the special agent that "because petitioner was not in business prior to 1967 he could not have had any accounts receivable".

At the close of the Government's presentation, defense counsel suggested to this petitioner that he should rest defense, in his opinion the Government had not proved its case. Petitioner and his wife asked that counsel submit a Motion for Judgment of Acquittal if he felt this were true. Petitioner further informed counsel that in no way would he agree to resting without submitting a defense if the court denied the Motion for Acquittal. (There exist sworn affidavits of bystander witnesses who were present during the conversation.) This request was refused. It was then requested that he ask for an early adjournment (it was then approximately 3 or 3:30 P.M.) so they would have time to think about it. This request was also refused.

Upon returning to the bench, defense counsel did make such a motion at a sidebar conference, it was denied by the court, counsel did not inform the petitioner of this but immediately rested the defense.

In AMERICAN JURISPRUDENCE 2d DESK BOOK III. Document No. 91, CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION (15) it is said:

> "The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability", to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. (Emphasis supplied) "In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."

Withheld from this petitioner was the fact that he had made and the court denied the Motion for Acquittal. The first notice that petitioner had was in reading the transcript of the trial.

The Record, itself, lends a strong inference to the proposition that counsel offered no defense because he had other plans for the time required to offer it. The record reflects that on Monday, March 19, 1974 a Motion for Extension of Deadline for Filing of Motion for New Trial, was filed by Attorney Niki Schwartz, who termed himself "Counsel for Defendant", in which it was shown that Attorney Rotatori, petitioner's trial counsel, would be out of the city for the balance of the month of March.

The Sixth Circuit Court of Appeals refused to consider certain evidence contained in petitioner's appendages to his Brief on Appeal for the reason that such evidence was not part of the record below and would, therefore, improperly "enlarge the record". The fact being that part of the evidence was a part of the record submitted by the United States Attorney, himself, appearing in the subpoenaed microfilm.

The claim that this petitioner was not properly represented by counsel is not an unsupported claim made solely by this petitioner. As a matter of fact, the claim was made by Mr. Rotatori himself.

In his Memorandum in Support of a New Trial filed with the District Court subsequent to petitioner's conviction, Attorney Rotatori argued to the District Court:

> "The denial of the Motion (Continuance) thereby requiring defendant to proceed to trial without the assistance of the tax and accounting expert who had worked with defendant's counsel in preparation and presentation to the Government of a net worth statement, denied the defendant the effective assistance of counsel." (Emphasis added)

Remembering that said Memorandum was filed subsequent to the conviction, Attorney Rotatori goes on the record himself as admitting that he ineffectually represented this petitioner.

This Honorable Court speaking in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932), through Mr. Justice Sutherland stated:

> "The Sixth Amendment guarantees that a criminal defendant shall enjoy the right "to have the Assistance of Counsel for his defense." This guarantee was interpreted to mean the effective assistance of counsel."

The Sixth Circuit in BEASLEY, supra, said:

> "(E)ight years later, speaking through Justice Black, the Court held that "The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." Avery v. Alabama, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L Ed 377 (1940). Resting its holding on the Fourteenth Amendment, since a state defendant was involved, the court held that the trial court's denial of a continuance requested by appointed counsel had not deprived the defendant of the effective assistance of counsel. On the fact of the case, "His appointed counsel....have performed their 'full duty intelligently and well'". 308 U.S. at 450, 60 S. Ct. at 324. In Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed 680 (1942) the court enforced the implication of Avery that an inadequate performance by counsel would render a conviction void. Basing its holding on the Sixth Amendment, since a federal defendant was

> involved, the Glasser court overturned a conviction of a defendant whose attorney was retained by co-defendant with a potentially inconsistent defense.

The Sixth Circuit, continuing in Beasley, said:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. 315 U.S. at 76, 62 S.Ct. at 467". (SEE ALSO: White v. Ragen, 324 U.S. 760, 65 S.Ct. 978, 89 L. Ed. 1348 (1948)
>
> "Most recently, in McMann v. Richardson, 397 U.S.759, 90 S. Ct. 1441, 25 L. Ed. 763 (1970) the Supreme Court stated that "It has been recognized that the right to counsel is the right to the effective assistance of counsel". Continuing: "(I)f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel...."

The Sixth Circuit held in Beasley, supra, to wit:

> "(3-5) We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation

<u>of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence</u>."

Petitioner has carefully documented numerous instances wherein defense counsel permitted extremely erroneous and prejudicial testimony to enter the record without challenge. Petitioner hereby requests permission to forward the "Appendages" to this court.

QUESTION IX

During the course of this trial, defense counsel notified the trial court, to-wit:

MR. ROTATORI: Your Honor, before the jury is called in I want to bring something to the court's attention.

THE COURT: Certainly.

MR. ROTATORI: Saturday morning I received in the mail, Your Honor, a notification that my tax return is going to be audited. I feel that it is not coincidental that I received this notification during the course of this trial. The only other time I was audited was in the course of United States v. D'Alessio, another criminal tax fraud case which I tried before this court.

And, I can't help, Your Honor, but feel that this involves, really, an attempt

by governmental agency to interfere with the right to counsel and to, in effect, attempt to deny a defendant to effective counsel. (SEE: EIGHTH ISSUE)...."I should add that in the D'Alessio matter it was not only myself that was subject to audit, but it was my expert Mr. Ricci who was also audited and received notification the very same date."

Petitioner knows of no good reason to burden this Honorable Court with a long dissertation on the why's and wherefore's of the Internal Revenue Service's determination that an audit would be made of defense counsel's return at the very moment that he was defending this petitioner. Producing proof positive to the effect that the audit was determined for the reason that said defense counsel was defending this petitioner would be impossible to do. However, when taken in context with the previous notice of audit, under similar circumstances it would be safe to state that there are persons in prisons at this very minute convicted on weaker circumstantial evidence than is presented here.

Petitioner feels it would be dispositive of the entire issue if the United States Attorney would inform this Honorable Court as to whether the audit was cancelled when defense counsel offered no defense whatsoever. It should be noted that the Sixth Circuit made no comment on this issue at all.

As stated in BECKWITH, supra:

> "In the light of this nation's recent experience with an administration's compiling "enemies lists" and utilizing the Internal Revenue Service to "harass" citizens for other non-tax-related reasons, this case clearly involves a question of exceptional importance meriting consideration by this court".

QUESTION X

The file compiled on this cause will reflect a total cooperation by this petitioner with the requests and demands of Government agents who gave no MIRANDA warning. No record, no file and no document was withheld from the investigating agent who was "turned loose" in petitioner's office even to the extent of Agent Tracy being totally alone. Further, on April 15, 1971 petitioner agreed to the extension of the Statute of Limitation to June 30, 1971 believing that if any deficiency were found in his returns said deficiency would be corrected with further payment.

Subsequently, on June 25, 1971 petitioner agreed to yet a further extension of the Statute of Limitation believing it his duty to cooperate with Government agents. Again, on September 2, 1971 petitioner signed yet another form 872 extending the Statute of Limitation a third time.

All such agreements to the Statute of Limitation predicated upon the last paragraph of a letter received by petitioner from the District Director of the Internal Revenue Service, dated January 11, 1971, stating:

> "By extending the limitation period, you will have time, if you choose to present your views at conferences at district and regional levels if we propose adjustments you do not agree to."

In addition to above, and never being warned of his rights under MIRANDA, petitioner was assured that "nothing would come of it". Said assurances made to him by Internal Revenue Agent Tracy.

Petitioner strongly urges this Honorable Court to take into serious consideration the fact that these were the first two years he was in business, with the business "dropped into his lap", so to speak. Within a ninety day period the only two major publishing companies both discontinued their field sales organizations - Cowles Sept. 1966; Curtis Dec. '66. Both were employers of petitioner. Neither he nor his wife had any formal training in bookkeeping or other record keeping and certainly not net worth.

In Holland v. United States, 348 U.S. 121, this Honorable Court warned:

> "Nevertheless careful study indicates that it (net worth method) is so

> fraught with danger for the innocent that courts must scrutinize its use." 348 U.S. at 125.

Attorney-Accountant Hubert Howes testified at trial that petitioner was in a new business and it was a rather "chaotic" period for him and he didn't even know if the business would last.

This petitioner would urge this court to consider the fact that at no time did he deny that because of the state of his records, best described by Attorney-Accountant as "chaotic", a tax liability might exist. (It should be noted that all returns filed by this petitioner prior to his entry into business were found by the Internal Revenue Service to be in "excellent order".

Further supporting this petitioner's claim of complete cooperation with Government agents is the letter written by petitioner to Special Agent Pope, which accompanied documents requested by the special agent in which petitioner advised the special agent:

> "Should there be organizations that are not included here that you want, I will be most happy to pull the file if you will give me the organization city and checks in question, or my files are available, as they were for Mr. Tracy, for your viewing or photocopying."
> (Emphasis added)

Petitioner would assert that a showing of good character and integrity is a basic element in the positive defense to a charge of wilfully and knowingly committing a crime. Although petitioner had a plethora of witnesses to testify to his integrity and his excellent character, he was precluded the use of said witnesses by his counsel interposing no defense.

This petitioner would respectfully direct this Honorable Court's attention to the language used by this Honorable Court in United States v. Murdock, (1933) 290 U.S. 389, 78 L Ed. (Adv. 225), 54 S. Ct. 223, wherein the Court said:

> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of his records he maintained, should become a criminal by his mere failure to measure up to the prescribed standards of conduct. And the requirement that the omission in these instances must be wilful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information."

CONCLUSION

WHEREFORE, it is submitted that this Court should grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

James L. Allen
P.O. Box 8380
Canton, Ohio 44711

In propria persona

November 1, 1975

Appendix A

No. 74-1959

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES L. ALLEN,
Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed September 2, 1975.

Before WEICK, McCREE and MILLER, Circuit Judges.

WEICK, Circuit Judge. Allen has appealed from his judgment of conviction entered upon a jury verdict of guilty on two counts of an indictment charging him with willfully attempting to evade income taxes for the years 1967 and 1968 in violation of 26 U.S.C. § 7201. He was sentenced to two, five year concurrent terms of imprisonment, the first six months of which were to be served in a jail-type institution and he was placed on probation for the balance of the sentence. He was fined $2,500 on each count or a total of $5,000. Count I of his indictment was dismissed.

Although he was represented in the District Court by two retained trial lawyers, his brief in this court, as well as his oral argument, were *pro se*.

At the trial, the government used the net worth and expenditures' method of proof. Its evidence tended to prove that although Allen and his wife, in joint income tax returns,

reported a taxable income of $11,225.56 for 1967 and $16,580.-79 for 1968, their net worth increased $18,402.37 during 1967 and an additional $35,436.96 during 1968. The Allens' actual taxable income was computed to be $26,415.68 for 1967 and $44,036.54 for 1968. A technical adjustment, adjusting the 1968 income $10,000 downward to $34,036.54, was made to allow for an error discovered in one of the adding machine tapes used in preparation of the 1968 return. This adjustment allowed in full the deduction claimed by Allen in his original return.

Allen had been employed, prior to 1967, by various magazine circulating companies supervising the activities of magazine salesmen.

Late in 1966 Allen started his own business, calling it National Organization Sales. He was a subfranchisee under a regional franchisee in the magazine subscription sales business. He acted as a clearinghouse for salesmen and others, who were independent contractors, and processed subscriptions to various publishers.

Revenue Agent Tracy described Mr. Allen's business:

> Mr. Allen explained to me that most of his sales were through a sponsor, and these sponsors usually consisted of VFW posts or volunteer fire departments or organizations similar to these.
>
> The sales campaign would be in a given locale, where they would advertise a sales campaign and explain that they were benefiting the sponsor, and the sponsor would take the proceeds they made, the profits, and use this money either for their organization or to buy hospital equipment. And he explained to me that the hospital equipment was free for public use and this was part of the campaign, to build up good will and so forth. This was publicized and the people that were sold subscriptions hopefully were aware of this fact, which would induce their sales.

The sponsoring organization would receive 8 percent of the gross sales for the campaign.

Allen admits that the volume of his business in 1967 totalled $596,087.30 and $711,988.14 for the year 1968.

National Organization Sales was operated primarily out of an office in the basement of the Allen home. During the years in question, the business records were kept in a single entry system, which Revenue Agent Tracy, who was assigned to perform a field audit of the taxpayers described as "unique." Tracy testified:

> To summarize my opinion, in areas where I felt he should have records he didn't have records; in other areas I felt he had too many records.

It was not possible to make an accurate accounting of all of Allen's income.

The Allens' tax returns for 1967 and 1968, and for many years prior to that time, were prepared by Hubert Howes, an attorney, and his wife, Shirley Howes, a certified public accountant. The returns were prepared primarily on the basis of information furnished by Allen. Mrs. Howes testified that in January, 1968 Allen discussed with her the advisability of setting up a bookkeeping system. Mrs. Howes finally set up such a system in 1970 for Allen. One of the theories of the case presented to the jury by the defense in argument was that Allen simply was inadequate to the task of starting and running his own business and keeping the records for that business. In other words, the defense argued that if some income was not reported, it was the result of the inadequate records, and not the result of a wllful attempt to evade income taxes. The defense also attacked the accuracy of the government's opening and closing net worth figures.

Much of the prosecution's evidence concerning willfulness was presented through the testimony of Internal Revenue Agent, James Tracy.

Agent Tracy testified concerning his audit of the returns

and investigation of the Allens' income. Tracy was assigned to conduct a field audit of the Allens' 1967 return on November 14, 1969. He visited the office in the basement of the Allen home many times from December 11, 1969 through April 15, 1970. He decided to audit both 1967 and 1968 income tax returns.

Tracy's testimony was important in establishing the accuracy of the net worth computations. He also testified that Allen at first denied and, later in the investigation, admitted receiving reimbursement for expenses from the Veterans of Foreign Wars for which expenses he had taken deductions in his returns.

During 1967 and 1968, Allen served as junior vice commander, senior vice commander and commander of the Ohio Veterans of Foreign Wars. Such payments by the Veterans of Foreign Wars could have been a source of unreported income and the initial denial of such payments was strong evidence of willfulness. Tracy also testified that Allen denied making a profit on hospital equipment which sponsoring organizations order in lieu of receiving cash for sponsoring a sales campaign. Other evidence in the case tended to show that Allen did make a profit on the sale of such equipment. Again, the profit could be a source of unreported income and the denial would be evidence of willfulness in the evasion of income tax.

I

Allen contends that the District Judge committed prejudicial error in denying his motion for continuance which was sought because of the illness of one of his attorneys, Edward Lebit. The motion asserted that Mr. Lebit, a former employee of the Internal Revnue Service, was primarily responsible for the accounting and tax aspects of the case and was to testify as an expert for the defense and to serve as co-counsel. The motion further recited that it would be a month before Mr.

Lebit would be well enough to even have business visitors. Trial counsel wished to discuss the case with Mr. Lebit before deciding whether to employ substitute counsel. The motion did not indicate how much of a continuance would be necessary.

The government opposed the motion on the grounds that trial counsel, Robert J. Rotatori, had been connected with the case since March 20, 1973, which was over ten months prior to the filing of the motion for continuance; that the defense possessed the government's tentative net worth schedule and almost all documents which would be introduced at trial; that the case had previously been continued several times at Allen's request, and that there was no showing why attorneys associated with Mr. Lebit, who also were former employees of the Internal Revenue Service, would be unavailable to replace him in the fifteen days remaining before trial.

Mr. Rotatori was present for the status call of the case on March 20, 1973 and signed the motion and order for discovery. He represented Allen at the hearing on the motion to suppress. He had sought and obtained several continuances. The case had been assigned for trial on a standby basis on May 1, 1973 but the trial did not commence until February 25, 1974. The record discloses that Allen's defense was ably conducted by Mr. Rotatori.

In addition, Allen was represented at the trial by Edward Kleinman who served as associate counsel. Mr. Kleinman was a former employee of the Internal Revenue Service and had assisted Mr. Lebit during various pretrial matters. He was familiar with the case and was available to assist Mr. Rotatori on any technical matters.

The grant or denial of a continuance is within the sound discretion of the trial judge and will be disturbed on appeal only where there has been a clear abuse of discretion. *United States* v. *Ploeger*, 428 F2d 1204 (6th Cir. 1970). In our opinion, there was no abuse of discretion in the denial of the motion under the circumstances as presented to the trial judge. *Glaca-*

lone v. *Lucas*, 445 F2d 1238 (6th Cir. 1971), *cert. denied* 405 U.S. 922 (1972).

II

Allen further contends that the District Court erred in denying his motion to suppress statements made by him to representatives of the Internal Revenue Service, and for return of all documents obtained from him or his accountant. He claims that he was entitled to the *Miranda* warnings. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The Allens were not in custody and the *Miranda* warnings, in our opinion, were not required. *United States* v. *Carter*, 462 F2d 1252 (6th Cir. 1972), *cert. denied* 409 U.S. 984; *United States* v. *Stribling*, 437 F2d 765, 771 (6th Cir. 1971), *cert. denied* 402 U.S. 973.

In the absence of a clear showing that the taxpayer has been tricked or deceived by the government agents into providing incriminating information, the documents and statements obtained by the Internal Revenue agents are admissible *United States* v. *Marra*, 481 F2d 1196, 1203 (6th Cir. 1973), *cert. denied* 414 U.S. 1004. The District Court's factual findings that there was no such showing are supported by substantial evidence and are not clearly erroneous.

III

Allen's next contention is that the District Court erred in permitting Internal Revenue agents to testify, over objection, that they investigated certain accounts receivable "leads" furnished to the government by Allen and that they were unable to verify the amounts set out on the accounts receivable list.

Since Allen computed his income by the accrual method, accounts receivable in existence prior to the opening net worth date would constitute a possible source of non-taxable income with respect to the tax years in question. The government is required to investigate leads reasonably susceptible of being checked concerning possible sources of non-taxable income. *Holland* v. *United States*, 348 U.S. 121, 135-136 (1954).

The defense objection was made on the theory that the testimony was hearsay. An agent's testimony that he was unable to verify the account receivable amount allegedly due from a named person as the result of his investigation is not hearsay. The agent is simply stating the result of his investigation. He is not recounting the out-of-court statement of the person who allegedly owes the account. The agent must testify concerning his inability to verify the amount if he is to negate the possible source of non-taxable income, or, in other words, the validity of the "lead."

IV

Allen further contends that the District Court erred in allowing the prosecution to impeach one of its witnesses, Daniel Pagnotta, by the use of his prior inconsistent statements. This court has already rejected "as unsound and illogical the rule that prohibits a party from impeaching a witness whom he calls." *United States* v. *Bryant*, 461 F2d 912, 918 (6th Cir. 1972).

Allen also contends that the government's expert summary witness, Adele Kihlken, improperly commented upon the credibility of Mr. Pagnotta's testimony. The statement complained of was made in answer to a question by defense counsel as to why Mr. Pagnotta's testimony was not reflected in the accounts receivable figures. The witness explained that she had to accept one figure or another for her summary. She further explained that she understood Mr. Pagnotta's testimony to be that he made payments to Allen during the period in question, but yet the amount of his debt to Allen remained the same. Trial counsel brought out in further cross-examination that Mrs. Kihlken's understanding of Mr. Pagnotta's testimony may have been wrong. It is important to note, however, that on redirect examination Mrs. Kihlken testified concerning

the effect including the payments testified to by Mr. Pagnotta would have on the net worth summary. All of the facts were before the jury for the jury's resolution. We find no error in this contention.

V

We find no error in the court's failing to record the testimony of Special Agent Pope before the Grand Jury. *United States* v. *Battisti*, 486 F2d 961 (6th Cir. 1973).

The court did not err in admitting the summary prepared by the government's expert witness as it was based on facts established by evidence in the record. *United States* v. *Bartone*, 400 F2d 459 (6th Cir. 1968), *cert. denied* 393 U.S. 1027 (1969).

VI

During IRS Agent Tracy's direct testimony, the defense moved the court for an order requiring the government to produce his Referral Report, which is the form used for referring the case to the Intelligence Division and his Revenue Agent's Report. The defense did not ask for the production of Special Agent Pope's criminal Reference Report. It was the claim of the defense that both these Reports of Agent Tracy were statements required to be produced under the Jencks Act, 18 U.S.C. § 3500.

Attached to the Referral Report were six schedules containing net worth computations which were the basis for the Report. The District Court ordered the government to produce the schedules but not the Report itself which he concluded was merely an inter-departmental communication and not producible. Thus, with the exception of the two page Report itself and one preliminary computation which did not relate to Agent Tracy's testimony, the defense was given everything in the Report. The court also ruled that the Revenue Agent's Report was not producible. The Report consisted merely

of net worth schedules of use in computing Allen's income tax liability for civil purposes. It is dated a year after the date of the Referral Report. Both Reports were sealed and transmitted to this court.

The defense offered in evidence the schedules attached to Agent Tracy's Referral Report and a few other exhibits and then rested at the close of the government's case in chief without offering any evidence except the schedules and other exhibits.

There was extensive cross-examination of Agent Tracy concerning his net worth computations and also of Adele Kihlken, the government's expert who testified concerning the summary which she prepared. As previously stated, the defense did not even move for the production of Special Agent Pope's Criminal Reference Report.

It is our opinion that even though the entire reports could have been considered producible under the Jencks Act, the failure to order production was harmless error. *United States* v. *Ball*, 428 F2d 26 (6th Cir. 1970).

VII

The government was not required to prove the exact amount of Allen's income for the tax years in question. It was required to prove beyond a reasonable doubt that Allen's tax returns contained a substantial understatement of income for the years in question and that the understatement was willful for the purpose of attempting to evade the payment of his income taxes. *United States* v. *Johnson*, 319 U.S. 503 (1943).

The jury could take into account that by his own admission the volume of Allen's business for 1967 was $596,087.30 and $711,988.14 for the year 1968; that with this large volume of business for the two years in question, Allen did not keep adequate records so that the amount of his income could be accurately ascertained; that he took deductions for expenses on his income tax returns notwithstanding the fact that he had received reimbursement for the expenses from VFW and

that he did not report profits he made on the sale of hospital equipment to his sponsors.

We also note Allen's claim that he was not adequately represented by counsel at his trial which the record shows is without merit.

We are of the opinion that the jury's verdict is supported by substantial evidence and that no prejudicial error intervened.

Allen has submitted as an appendage to his brief, two volumes of material not contained in the record. The record cannot be enlarged in this manner and we cannot consider the material. *United States* v. *Collins*, 349 F2d 296, 298 (6th Cir. 1965); *United States* v. *Young*, 301 F2d 298 (6th Cir. 1962). We have considered other alleged errors claimed in Allen's brief which in our opinion have no merit and do not need to be discussed.

Affirmed.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

September 26, 1975

Mr. James L. Allen
Box 8380
Canton, Ohio 44711

Re: James L. Allen v. United States
No. A-267

Dear Mr. Allen:

Your application for an extension of time in which to file a petition for writ of certiorari in the above-entitled case has been presented to Mr. Justice Stewart, who on September 25, 1975, signed an order extending your time to and including November 1, 1975.

A copy of the Justice's order is enclosed.

Very truly yours,

MICHAEL RODAK, Jr.,Clerk

By

Francis J. Lorson
Deputy Clerk

dam
Enclosure
cc: The Solicitor General of the United States
Clerk, United States Court of Appeals
(74-1959) for the Sixth Circuit
Cincinnati, Ohio 45202

SUPREME COURT OF THE UNITED STATES

No. A-267

JAMES L. ALLEN,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner, it is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 1, 1975.

/S/ Potter Stewart
Associate Justice of the
Supreme Court of the
United States

Dated this 25th
day of September, 1975.

AUDIT TECHNIQUE HANDBOOK

FOR INTERNAL REVENUE AGENTS

Audit Division IRM 4231

921 Initial Interview *

(1) One of the most important phases of any investigation is the initial interview with the taxpayer. This is especially true when the records are inadequate, non-existent, or there is reason to believe that they are false. This first interview offers the examiner opportunities to obtain information which may not be forthcoming at a later date.

(2) This interview should be exploited to its utmost, for the information secured may save many days of work in the future. Encourage the taxpayer to discuss himself, family, business, hobbies, financial history, and his sources of income of himself and other members of his family. The revenue agent, however, should not make the taxpayer feel subjected to a formal interrogation. He should try to make as many pertinent determinations as possible by guiding the interview rather than by direct questions.

(3) The revenue agent at this phase of the examination should attempt to secure from his conversation with the taxpayer sufficient facts to evaluate the over-all financial picture of the taxpayer, his approximate mode of living, his life insurance program, investments, unu -

ual expenditures, as well as gifts, loans, inheritances and other nontaxable receipts received by him. The examining officer should then be in a position to see if the taxable income reported bears a plausible relationship to the taxpayer's net worth and manner of living.

(4) If the desired information cannot be secured from a casual interview with the taxpayer, the examining agent should prepare a series of questions to ask. Except in unusual circumstances he should develop the case as much as possible from information and data furnished by the taxpayer rather than from an outside source, normally a much more time-consuming job.

(5) The following paragraphs contain some suggested approaches to use if there are inadequate records present, or if the taxpayer is uncooperative and there is reason to believe that fraud is involved.

(a) Secure information as to the taxpayer's dependents and family, and determine the status of the family as to age, degree of support and their names and addresses. This information will not only assist the examiner in the determination of the allowable exemptions and dependents in the computation of the tax, but will aid the agent in determining the cost of living of the taxpayer resulting from family size, dependents outside the household, unusual expenditures for children who may be in college, camp, etc.

(b) Secure information as to the taxpayer's bank accounts and those of his immediate family and, if possible, the ledger sheets and cancelled checks of all accounts. If the checks and ledger sheets are not available, the examining officer should be sure to secure the locations and the names of these accounts. Particular emphasis should be placed on bank accounts which are not normally a part of the business records, since unreported receipts may have been deposited in the non-business bank accounts. A more detailed discussion on the analysis of bank accounts appears at 940.

(c) Determine the taxpayer's security holdings including both stocks and bonds, taxable or nontaxable, governmental or commercial. The agent should ascertain the dates acquired, dates sold, costs, selling price, where acquired, where sold. Such information may not only develop specific items of capital gains, interest and dividend income, but may disclose cash purchases which are not accounted for by reported income and sales proceeds invested in previously undisclosed assets.

(d) Obtain a listing of the taxpayer's real estate holdings similar to the manner in (c) above from public records and escrow statements with the same purposes in mind. Also, questions about the taxpayer's personal residence may give indications that he is spending for this item more than could be justified by the size of the income reported.

(e) Determine the extent of the taxpayer's currency accumulations. Most taxpayers will not have a record of amounts as of particular dates. In many instances, the agent's entire case may hinge upon the correct determination of this one item alone. It is most important that the examiner word any questions in such a manner as to leave little doubt as to what was asked. If it appears that the examination will depend on this item, it may be necessary to secure an affidavit from the taxpayer or have a witness to corroborate the answer given. Some typical questions which may be asked about currency accumulations to develop this information are as follows:

1. Has it been your practice, or the practice of your wife or children to accumulate cash on hand? This includes undeposited cash at all locations such as at your home, at your place of business, in a safety deposit box or in the possession of some third party. This does not include funds which are on deposit in a financial or savings and loan establishment, the amount of which is a matter of record.

2. Would you ever have had cash on hand to exceed $100.00? To exceed $500.00? To exceed $1,000.00? To exceed $5,000.00?

3. When?

4. For what purpose did you have that cash on hand?

5. How much cash on hand do you have at the present time? In this manner the

desired information may be secured by indirect means rather than by a direct request as to what was on hand as of a particular date. In 932 a discussion is presented on methods of verification of taxpayer's contentions about cash on hand at the beginning of the period under examination.

(f) Secure information about the taxpayer's accounts, loans and notes receivable. This is especially significant when the taxpayer is required to report on the accrual basis. Since this information, in many instances, is most difficult and time consuming to secure from third parties, the examining officer should secure for analysis any records, workpapers or other data which will assist in the determination of these items.

(g) Secure information on inventories, by whom they were prepared, the method used in the determination and any workpapers used in the computations.

(h) Obtain a list of the taxpayer's equipment, showing dates of acquisition and disposition, costs, selling prices, suppliers, purchasers, trade-ins, whether financed or paid for without borrowed funds.

(i) Make a list of other assets, both business and personal, securing dates of purchase, costs, dates of sale, selling prices, names of purchasers or suppliers.

(j) Secure information regarding bank loans, personal loans, accounts pay-

able and other borrowed funds of the taxpayer. Information received may help to explain asset acquisitions or indicate undisclosed income being used to reduce the taxpayer's liabilities. In checking bank loans and other loans, ascertain if collateral is involved. This may lead to the discovery of hidden assets. The item of business accounts payable is especially significant when the taxpayer is required to report on the accrual basis and since this item may be difficult to secure from third parties, any records, workpapers or other data which will assist in this determination should be secured.

(k) Secure information regarding depreciation rates and methods of computation, and also develop facts as to depletion, if applicable. Since depreciation and depletion cause a reduction in taxable income without an outlay of cash, this should not be overlooked in the consideration of the taxpayer's overall financial picture.

(l) Obtain information about the taxpayer's living expenses. Many individual items may be included under this broad category. The example below will assist the agent in the determination of this item; however at the initial interview it may be expedient to break down these expenditures on the basis of fixed and variable expenses. The fixed expenses which will normally repeat year to year without too much variance will include food, minimum clothing expense, rent or mortgage payments, life and other

personal insurance payments and a certain amount of other living costs. The determination of the living expenses by this breakdown may disclose to the examining agent tax possibilities in other years besides the year or years assigned for examination.

(MT 4231-15 (1-13-69) IR MANUAL

* Sec. 900 is entitled "Examination of Returns - Inadequate Records"

MEMORANDUM OF INTERVIEW

December 11, 1969

Place: 2646 Orchard Park Dr. NW, Canton, Ohio 44718

In re: James L. and Marie D. Allen
Income Tax 1040 for 1967

Persons Present: James L. Allen, Taxpayer
Marie D. Allen, Taxpayer
James L. Tracy, Internal Revenue Agent

At the beginning of the examination Mr. and Mrs. Allen were interviewed. Mr. Allen provided the answers to questions. At times he checked with Mrs. Allen or consulted records. He was told to answer questions to the best of his ability where he was uncertain of a date or an exact fact.

Mr. Allen said he and Mrs. Allen were both 45 years of age. He also said they have been married 25 years and have one child, Dewitt. He said their son has been away attending Notre Dame University, in his freshman year, since September of 1969.

Mr. Allen said he attended college approximately two years. He said his wife attended college about one half year. He also said she had one bookkeeping course. Mr. Allen said he has been in the magazine selling business since he was a boy in Kansas City, Missouri. Mr. Allen said he started in the business full time in 1947 and has never been in any other business.

Mr. Allen said Mrs. Allen has never been employed since their marriage. Mr. Allen said he is a veteran and active in the VFW.

Mr. Allen said he considers himself a successful salesman and supervisor in selling magazines door to door. He claims this is in spite of over-all declining success in the business. He said his sales have been mostly in conjunction with VFW post and volunteer fire departments. He said these organizations are sponsors and have allowed him to build up a reputable name. Mr. Allen said they never work with schools as sponsors.

Mr. Allen said that as an employee he worked his way up to supervisor of the eastern half of the United States. He mentioned Look, Cowles Publishing Company, Curtis Circulation Company and National Organization Service, Inc., as previous employers. He claimed he survived a series of mergers and re-organizations until 1966 when the publishers terminated this phase of the business. Mr. Allen claimed that he and other fellow employees, without jobs, decided to set up an organization with existing sales personnel in the field. Mr. Allen claimed he became a self-employed franchise manager in the new organization which clears approximately 30 publications with Curtis Circulation Company. Mr. Allen said he is like a clearing house for men in the field.

Mr. Allen said he consults Attorney Hubert Howes in regard to records, books and tax returns due. He also said Mr. Howes has

prepared his returns since at least 1954. Mr. Allen said Mr. Howes keeps his depreciation records, but all other books and records are retained at his office. Mr. Allen said he receives reports for sales orders from supervisors and managers in the field. He explained that the reports are recapped weekly for his records.

Mr. Allen said his supervisors and managers are not employees. They are independent contractors. He said he discussed this with Attorney Howes. He also said he has no control over them. He said he files forms 1099 and 1096. He claimed he does not reimburse the men for expenses or give them an allowance.

Mr. Allen said he and Mrs. Allen have five savings accounts and five checking accounts. He said all of them are with the Harter Bank & Trust Company of Canton, Ohio. Mr. Allen said three of the checking accounts are used for business. They are:

Master Account #6074057
Office Account #6087019
Organization A/C#6069975

Mr. Allen said both he and Mrs. Allen have personal checking accounts. They are:

Mr. Allen A/C #5000599
Mrs. Allen A/C #5074339

Mr. Allen said he uses his account for insurance and personal checks. He said his wife uses her account for home and personal expenses.

Mr. Allen said three of his savings accounts are used for business. He said they are as follows:

Sponsors	A/C #15633-08
Bad Checks	A/C #14722
Managers	A/C #16319

Mr. Allen said money in the above savings accounts is not his. He holds money for sponsors, supervisors and managers until reports are finalized. He claims that he puts money into savings accounts while he is holding it and collects the interest which he reports. He also said only the interest belongs to him.

Mr. Allen said the other savings accounts are personal as follows:

Joint	#9292-01
Mrs. Allen	#04-1334-02

Mr. Allen said his son has a savings account which had not been used for several years. He said it is account #9552 at The Harter Bank & Trust Company.

Mr. Allen said he and Mrs. Allen had a mortgage at Citizens Savings Association of Canton. He said it was account # C-64700 and paid off during 1967. Mr. Allen checked his balance at 1-1-67 and said it was $3,763.34. He said his payments were $75.0 per month, but on August 14, 1967 he paid it off with a payment of $3,358.83.

Mr. Allen said they do not have a safe deposit box. He also said except for their residence, they do not own real estate

property. Mr. Allen said they have never owned investment securities of any type including stocks and bonds.

Mr. Allen said he has no income in addition to his interest income and business income. This agent asked him about his House of Jamar business reported on his return. Mr. Allen said that he and his wife were interested in that business for a very short time. He said they investigated it and purchased an initial inventory of products such as cosmetics, paper napkins and similar items for local sales distribution. Mr. Allen said they discontinued this business after only a few sales due to the time required in his magazine business. He said the stock was consumed by Mrs. Allen, given away as gifts to friends or still on hand and available for their personal consumption at home. He said they did not consider their investment a loss. He said early in 1967 they decided to discontinue all sales of these items.

Mr. Allen said he did not receive any tax free income such as disability pensions. He said he did not receive reimbursements for any of his expenses from the publishers or anyone else since he went into business and his employment was discontinued.

Mr. Allen said they have never received any gifts or inheritances in 1967 or any other year.

Mr. Allen said he has no time for recreation or hobbies. He claims he used to be a very good golfer, but he has not had time for it in recent years.

S/ James L. Tracy

Supreme Court, U. S.
FILED
DEC 31
MICHAEL RODAK, JR., CLERK

No. 75-643

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES L. ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-643

JAMES L. ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of two counts of willfully attempting to evade income tax for 1967 and 1968 by filing false and fraudulent returns, in violation of 26 U.S.C. 7201. The district court fined him $2,500 on each count and sentenced him to two concurrent terms of five years' imprisonment, the first six months of which are to be served and the balance on probation. The court of appeals affirmed (Pet. App. A 1-10).

During the prosecution years petitioner operated a subfranchise under a regional franchise in the magazine subscription sales business, which had gross receipts of almost $600,000 in 1967 and more than $700,000 in 1968 (Pet. App. A 2-3). Although his true taxable income was $26,415 for 1967 and $44,036 for 1968, petitioner

reported taxable income of only $11,225 and $16,580 for those years (Pet. App. A 1-2).

1. Petitioner first contends (Pet. 9-19) that his motion to suppress evidence should have been granted because he was tricked by the Treasury agents into turning over incriminating materials, and because the agents did not give him the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436. In order to prevail on his claim that he was deceived by the revenue agent — who had no information to indicate fraud until he referred the case to the Intelligence Division in May, 1970 (Motion Tr. 51-52, 57)[1] —petitioner had to establish by clear and convincing evidence that the agent made an affirmative misrepresentation for the purpose of misleading him. See, *e.g.*, *United States* v. *Prudden*, 424 F.2d 1021 (C.A. 5); *United States* v. *Sclafani*, 265 F.2d 408 (C.A. 2). However, after a full hearing, the district court correctly concluded that petitioner did not meet his burden of proving that the agents had deceived him.[2]

Moreover, petitioner's claim of entitlement to *Miranda* warnings is likewise without merit. When the special agent first telephoned petitioner and advised him that one of the special agent's functions was the investigation

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[1]"Motion Tr." refers to the transcript of the hearing on the motion to suppress evidence. "Tr." refers to the trial transcript.

[2]Nothing in the evidence petitioner alleges to be newly discovered suggests any deceit or trickery on the part of the agents. At all events, petitioner's remedy is either to move for a new trial on the ground of newly discovered evidence or to attack the judgment collaterally under 28 U.S.C. 2255. In either case, the proceeding must be commenced in the district court. *United States* v. *Brown*, 476 F.2d 933 (C.A.D.C.); see *Scott* v. *United States*, 334 F.2d 72 (C.A. 6), certiorari denied, 379 U.S. 842.

of possible criminal tax fraud (Motion Tr. 16-18), petitioner stated that he was going to talk to his attorney (Motion Tr. 29-36), who handled all subsequent contacts with the Service. The special agent thus never met with petitioner and no evidence was obtained during his contact with petitioner. Thus, this case does not raise the issue presented in *United States* v. *Beckwith*, 510 F.2d 741 (C.A.D.C.), certiorari granted, 422 U.S. 1006, argued December 1, 1975, as to whether special agents are required to give *Miranda* warnings to a taxpayer in a non-custodial interview.

2. Petitioner further contends (Pet. 19-20) that the district court erred in denying a continuance when one of his trial counsel became ill in January, 1974. The facts are as follows: The case went to trial on February 25, 1974, nine months after it was originally set for trial. Petitioner was represented at the trial by Robert J. Rotatori, an experienced criminal lawyer, who had been in the case for over ten months, and who was assisted by associate defense counsel who was a certified public accountant and who had formerly been employed by the Internal Revenue Service. Both counsel were thoroughly familiar with the case, so that the illness of a third counsel in no way prejudiced petitioner. Thus, the trial court's denial of his motion for a continuance was within its discretion. *Giacalone* v. *Lucas*, 445 F.2d 1238 (C.A. 6), certiorari denied, 405 U.S. 922; *United States* v. *Abshire*, 471 F.2d 116 (C.A. 5). As the court of appeals stated (Pet. App. A 5), "The record discloses that Allen's defense was ably conducted by Mr. Rotatori."

3. Petitioner also argues (Pet. 21-25) that the trial court erred in denying certain Jencks Act material to the defense for use in cross-examination of the government agents. The documents in question are the revenue agent's referral report originally transmitting the case to the Intelligence Division for investigation of a possible crime,

the revenue agent's report, and the special agent's criminal reference report. However, the government turned over to the defense six schedules containing net worth computations which were the basis for the revenue agent's referral report. Although the two-page report itself was withheld, the district court correctly concluded that it was a nonproducible inter-departmental communication.

The revenue agent's report itself consisted merely of net worth schedules, which were useful in computing petitioner's income tax liability for civil purposes. Since petitioner conducted extensive cross-examination of both the revenue agent and the government's expert witness who computed and testified about petitioner's income tax liability based upon the evidence produced at trial, the court of appeals properly held that even though the entire reports "could have been considered producible under the Jencks Act, the failure to order production was harmless error" (Pet. App. A 9). See also *United States* v. *Ball*, 428 F.2d 26 (C.A. 6).[3]

4. Contrary to petitioner's additional argument (Pet. 26-29), the trial court properly admitted into evidence the government's summary exhibit (Govt. Ex. 31). The government may use expert witnesses and summary schedules in proving criminal tax cases. *United States* v. *Johnson*, 319 U.S. 503, 519-520; *Holland* v.

[3]Moreover, petitioner's argument (Pet. 28-29) relating to alleged misuse of microfilm records rests not upon documents admitted into evidence but upon documents appearing only in two volumes of "appendages" which petitioner attempted to persuade the court of appeals to incorporate into the record. That court properly refused to do so (Pet. App. A 10). *In re Buckey*, 395 F.2d 385, 387 (C.A. 6); *United States* v. *Collins*, 349 F.2d 296, 298 (C.A. 6). With respect to the third document—the special agent's criminal reference report—petitioner never requested it (Pet. App. A 8).

United States, 348 U.S. 121, 127-128. Indeed, without such summaries of the evidence, the jury would lack essential guidance in complex tax evasion cases. Here, the government's witness properly testified as to the evidentiary basis for each entry on the summary (Tr. 1107-1183, 1202-1233, 1244-1270). "Guarding instructions" relating to the use to which the jury could put the summaries were given at both the start (Tr. 1107) and the end (Tr. 1292-1293) of the agent's testimony, and again in the main charge (Tr. 1521-1522). See *Holland* v. *United States*, *supra*, 348 U.S. at 127-128.

5. Petitioner argues (Pet. 29-30) that the government agents should not have been permitted to testify that they had been unable to substantiate the accounts receivable that petitioner alleged he had at the starting point of the net worth computation. However, the agents did not testify what third parties had told them, but described only the results of their own inquiries, *i.e.*, that they were unable to substantiate petitioner's claims. This testimony was properly admissible.

In *Holland* v. *United States, supra*, 348 U.S. at 135-136, this Court explained the need for the government to check out leads which could reasonably be verified and which, if true, would establish the taxpayer's innocence. All the agents did here was to describe the steps taken in their investigation of these leads and the results of that investigation (Tr. 1087-1102). Their testimony properly went to the question of whether they had discharged their duty of following leads rather than the question of whether the amounts in question were accurate. *United States* v. *Penosi*, 452 F.2d 217, 219 (C.A. 5), certiorari denied, 405 U.S. 1065; *Charron* v. *United States*, 412 F.2d 657 (C.A. 9); *McClanahan* v. *United States*, 292 F.2d 630, 637 (C.A. 5).

6. The failure to record the grand jury testimony of the special agent who investigated petitioner's case was not error (see Pet. 30-32). When the agent testified before the grand jury, the practice in the district was not to record the testimony of special agents (Tr. 786-788). There is no constitutional or statutory requirement for the recording of grand jury testimony. *United States* v. *Battisti*, 486 F.2d 961 (C.A. 6); *United States* v. *Heck*, 499 F.2d 778 (C.A. 9); *United States* v. *Cramer*, 447 F.2d 210 (C.A. 2), certiorari denied, 404 U.S. 1024. Moreover, petitioner was not prejudiced by the lack of the transcript, for he was afforded what amounted to complete discovery of the government's case, including the various schedules and summaries of interview which the agent had prepared (Tr. 790-933).

7. In answer to petitioner's contention (Pet. 32-33) that the government's expert witness on cross-examination improperly commented on the credibility of the earlier testimony of the witness Pagnotta, we rely upon the following statement of the court of appeals (Pet. App. A 7-8):

> Allen also contends that the government's expert summary witness, Adele Kihlken, improperly commented upon the credibility of Mr. Pagnotta's testimony. The statement complained of was made in answer to a question by defense counsel as to why Mr. Pagnotta's testimony was not reflected in the accounts receivable figures. The witness explained that she had to accept one figure or another for her summary. She further explained that she understood Mr. Pagnotta's testimony to be that he made payments to Allen during the period in question, but yet the amount of his debt to Allen remained the same. Trial counsel brought out in further cross-examination that Mrs. Kihlken's understanding of Mr. Pagnotta's testimony may have been wrong. It is important to

> note, however, that on redirect examination Mrs. Kihlken testified concerning the effect including the payments testified to by Mr. Pagnotta would have on the net worth summary. All of the facts were before the jury for the jury's resolution. We find no error in this contention.

8. Finally, petitioner argues (Pet. 33-40) that he was denied the effective assistance of counsel. However, this contention rests upon lengthy factual assertions (Pet. 33-36) which find no support in the record. As we have pointed out, petitioner's chief trial counsel, Robert J. Rotatori, had had considerable experience in criminal trial practice. He had participated in the case for ten months prior to trial and was assisted by Mr. Kleinman, an attorney and certified public account, who had formerly worked for the Internal Revenue Service, and who was also familiar with the case. Indeed, Rotatori's examination of the revenue agent (Tr. 141-205) demonstrated that he had a thorough knowledge of petitioner's records, accounts and businesses.[4]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[4]Petitioner also argues (Pet. 40-42) that he should have a new trial because his counsel Rotatori received a notice during the trial that his own tax returns were being audited. But that fact in no way demonstrates that the Internal Revenue Service was attempting to harass or intimidate him. The trial judge noted that when he was a practicing lawyer he had been audited many times. He stated that he would look into the matter (Tr. 1067-1070) and defense counsel said nothing further about it.

DOJ-1975-12